

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

WHITE PLAINS HOSPITAL CENTER

and

Case No. 2-CA-40160

KAWANA A. JOHNSON, An Individual

Darma Wilson, Esq., New York, New York,
for the Acting General Counsel
Francis Carling, Esq., New York, New York,
for the Respondent

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on October 13, 2010, and amended on December 21, 2010 and February 28, 2011, by Kawana A. Johnson ("Johnson" or the "Charging Party"), a Complaint and Notice of Hearing issued on April 28, 2011. The Complaint alleges that White Plains Hospital Center ("Employer" or "Respondent") violated Sections 8(a)(1) and (3) of the Act by discharging Johnson in retaliation for her activities on behalf of 1199 SEIU United Health Care Workers East (the "Union"). The Complaint also alleges that Respondent unlawfully interrogated employees regarding their activities on behalf of the Union, and created the impression that the employees' Union activities were under surveillance. Respondent filed an answer denying the material allegations of the complaint. This case was tried before me on August 3 and 4, 2011, in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the "General Counsel") and Respondent I make the following

Findings of Fact

I. Jurisdiction

Respondent is a New York not-for-profit corporation with a place of business located at 31 East Post Road, White Plains, New York, where it provides health care, including acute care services. Annually, Respondent in the course and conduct of its business operations derives gross revenues in excess of \$250,000, and purchases and receives at its White Plains facility goods and supplies in excess of \$5,000 directly from suppliers outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent employs over 2,000 employees at its facility. For many years, the unit clerks, storeroom clerks, food and nutrition workers, and housekeeping workers have been represented by a union, most recently 1199 SEIU Health Care Workers East. The engineering department employees have been represented by Local 30, International Union of Operating Engineers, for a significant period of time.

The Charging Party, Kawana Johnson, worked as a phlebotomist in the laboratory department. She began her employment on April 19, 2004. During Johnson's employment there were fifteen to twenty phlebotomists working in her department, together with other employees such as pathologists, clerks, and technicians.

At all times material to the events at issue here, John Sanchez was Respondent's Vice President of Human Resources, and Respondent's chief human resources officer. John Schandler is Respondent's President. Sue Liller is the Director of Occupational Health Services. Matthew Palazola is Respondent's Administrative Director for Clinical Diagnostic Services, which includes laboratory services. Martha Rivera is Respondent's Phlebotomy Supervisor, and was Johnson's direct supervisor, but was out on leave during the period prior to Johnson's discharge. Iris Oliver is the Coordinator for Phlebotomy, Admission Testing Center, Outpatient Department, and was Johnson's direct supervisor during Rivera's leave. In addition, on Mondays and Fridays, Johnson worked in Oliver's department and reported directly to Oliver. Yanira Aviles is Rivera's assistant, and acted as Oliver's assistant during the time that Rivera was on leave.

Respondent admits and I find that Sanchez and Rivera are supervisors within the meaning of Section 2(11) of the Act and agents acting on Respondent's behalf. Sanchez, Palazola, Liller, Rivera, and Oliver testified at the hearing.

B. The Union's Organizing Campaign, and Johnson's Activities

In mid-March 2010,¹ the Union began an organizing campaign among Respondent's non-represented employees, including nurse technicians, phlebotomists, transportation workers, storeroom clerks, and radiology clerks, at the White Plains facility. Anthony Peterson, a Lead Organizer for the Union, testified regarding the Union's organizing campaign. Peterson testified that during the campaign he and other Union representatives visited the facility every Wednesday to speak to employees. Peterson testified that on one occasion, Sanchez told him not to speak to Respondent's employees who were not already represented by the Union. Peterson also testified, based on "his understanding," that Respondent was engaged in "a heavy anti-union campaign," involving an "anti-union consultant."

Peterson initially met Johnson outside the facility in early April. They talked and she signed a union authorization card. Johnson also agreed to speak to her co-workers in the laboratory, and distributed about fifteen to twenty authorization cards to them. According to Peterson, Johnson was the only employee in the laboratory willing to do so. Subsequently, Peterson met with Johnson two or three times per week so that she could give him signed

¹ All subsequent dates are in 2010 unless otherwise indicated.

cards. Peterson testified that on a number of occasions he noticed Sanchez and Bob Sosa, head of security for the facility, observing the employees outside the facility during the 3 p.m. shift change, when he spoke with Johnson and obtained signed authorization cards from her. Johnson also testified that Sanchez and Sosa observed her speaking with Peterson.

Johnson participated in the union organizing campaign in other ways as well. Johnson served on the union's organizing committee with six other employees, and participated in union meetings and conference calls. Johnson referred other employees to speak with Peterson. A photograph of Johnson appeared on a leaflet in support of the Union, entitled "We're Voting Yes for 1199 SEIU," that was distributed to employees throughout the facility. Johnson also recorded a "robo-call," or recorded phone message, encouraging her co-workers to vote for the union. Finally, Johnson served as a union observer during the election itself, which took place on July 14.²

Johnson testified that the week prior to the election she attended a meeting with Schandler, Sanchez, Oliver, Palazola, and another supervisor. Johnson testified that during this meeting Schandler and Sanchez spoke about "the downside of having a union." Schandler stated that the co-payment for medical benefits that the employees were concerned about would not be imposed. He said that the employees were simply paying someone to speak for them if they selected the Union as their bargaining representative. Johnson testified that Schandler also told the employees that they would not have job security with the Union, and that the evening and night shift differential would decrease from \$2.00 to \$1.25 per hour. Johnson stated that she then asked Schandler why the hospital was opposing the Union so forcefully if the Union was so bad to begin with. According to Johnson, Schandler's face became red, and after a moment he said that he did not want a third party involved between him and his employees. Johnson testified that she was the only employee who spoke during this meeting.

Rivera and Oliver both testified that they were aware that Johnson supported the Union, and believed that she was engaging in activities on the Union's behalf.

C. The Alleged Unlawful Interrogation and the Creation of the Impression of Surveillance

Johnson testified that one day during the first two weeks of July, at around 1:15 p.m., Rivera approached her while she was alone in the accessioning room, and told Johnson that she needed to speak with her. Johnson testified that because she was not permitted to leave the accessioning area unattended, she waited for her co-workers to return from lunch, and then went to Rivera's office across the hall. Johnson testified that Rivera closed the door, and said that she heard that Johnson was "badmouthing" her to the Union, and trying to get her co-workers to sign union cards. According to Johnson, Rivera then said that her father was a union member, and was on strike when she was growing up. Rivera said that it was hard for her family to survive during the strike, and that as a single parent Johnson should give union representation careful consideration. Johnson testified that Rivera said that the Union did not provide job security, and showed Johnson a list of employees in the bargaining unit that had been discharged.

Johnson testified that during this discussion Phlebotomy and Hematology Shift Supervisor Robert Bottini entered the office.³ Bottini said that the employees should make sure to get whatever the Union was telling them in writing.

² The Union apparently lost the election, by a significant margin.

³ According to Johnson, Bottini shares this office with Rivera.

Rivera denied surveilling employees to determine whether they supported the Union, questioning employees about their Union sympathies, and showing anyone a list of terminated employees. She testified that she told the employees when they spoke to her about the Union that before they made a decision they should do their homework. Rivera testified that on one occasion, in the accessioning area, she spoke to several employees, Johnson among them, about the Union. Rivera testified that she told the employees that she could not choose for them, but that the Union did not work for everyone. She stated that she told the employees that once when she was very young her father was on strike, but that there was a positive outcome because her father returned to work. Rivera testified that she never had a private conversation with Johnson, or any other employee, regarding these issues.

During cross-examination, Johnson testified that she was certain that the conversation she described with Rivera and Bottini took place during the first two weeks of July. Rivera testified that she was out on a disability leave from June 30 until after the election. Liller, who as Director of Occupational Health Services is responsible for approving all such disability leaves and clearances for return to work, also testified that Rivera was on leave from June 30 until July 19.

Johnson testified that she and Rivera had quite a close relationship prior to their alleged conversation regarding the Union. Johnson testified that she referred to Rivera as her “lab mom,” meaning that “she was basically a protector over me, like a mother would to her child.” Johnson testified that she and Rivera were good friends, and had “a very good bond with each other and we speak to each other about a lot of things.”

D. Respondent’s Leave Policies and Johnson’s Employment History

Respondent promulgates an Employee Handbook which sets forth the terms and conditions of employment for non-bargaining unit employees. The Employee Handbook requires that employees notify their supervisor when they will be absent due to illness prior to the time they are required to report for work. If an employee is absent due to illness for three or more days, they must be cleared by Occupational Health Services before returning to work. An employee who is absent for more than seven consecutive days must submit a claim to Occupational Health Services in order to receive benefits for that time. The Handbook also requires that employees absent for five or more consecutive days due to injury or illness submit a return to work request form completed by the employee and their physician, which releases them to return to work.

Respondent has also issued policies regarding sick leave and disability. Policy No. 204 provides that employees absent beyond seven calendar days are subject to statutory disability guidelines and must make a claim for benefits in order to be paid for such time, including follow-up forms to be submitted every two weeks during the leave. This policy states that it is the employee’s responsibility to contact Occupational Health Services to apply for benefits, and that the Occupational Health Service must clear employees prior to their return to work. In Policy No. 307, Respondent reserves the right to require that the employee provide a medical examination and written clearance for unrestricted work, and to obtain an independent medical examination, when an employee has been absent for five or more consecutive days due to illness or injury.

With respect to sick leave, Respondent’s Policy No. 407 requires that employees who will be absent keep their supervisor informed on a daily basis by contacting their supervisor directly prior to the start of their scheduled shift. This policy provides that the daily notification

requirement may be waived in the case of hospitalization or extended illnesses. Failure to comply with the notification requirement will result in verbal counseling (first instance), a written warning (second instance), a three-day suspension (third instance), and discharge (fourth instance). In addition, if an employee does not make any attempt to notify the department or supervisor that they will be absent prior to the start of their shift, they will receive a one-day suspension (first instance) and discharge (second instance).

Both Johnson and Liller testified that Respondent's various sick and disability leave policies are contained in the Employee Handbook, and addressed during employee orientation and various policy updates given by Human Resources. Liller testified that when she makes presentations regarding the disability leave policy at, for example, employee orientation, she emphasizes that the completion and submission of forms and medical reports is the responsibility of the employee.

Johnson testified as to her understanding of these policies. She testified that she understood that she was required to call her direct or immediate supervisor when calling out sick, at least two to three hours prior to the start of her shift. She testified that she was required to call out sick "continuously" until going on a disability leave. Johnson testified that after seven days of calling out sick a disability form needs to be submitted in order to obtain approval for a continued absence due to illness. Johnson testified that she was very familiar with the procedure for disability leaves, having taken several in the past. She testified that she had been on disability leaves in 2006, 2007, 2008, and in 2009, when she was on disability leave for six months. In order to initiate a disability leave, she testified that she completed a Notice and Proof of Claim for Disability Benefits. She completed the first page of this form, and her doctor completed the second page. Subsequently, a Disability Follow-Up Request form had to be completed by her physician and submitted to Respondent every two weeks. Johnson testified that when she was ready to return to work she was required to obtain a doctor's clearance in order to do so; Liller testified that she generally required a written note from the employee's physician with a specific return date. During all of her prior disability leaves, Johnson communicated with Liller and other staff in the Occupational Health Services Department,⁴ and complied with these requirements to Respondent's satisfaction.

Johnson and Sanchez both testified that she had been disciplined in the past for excessive absenteeism. They testified that most recently Johnson had been suspended for three days for excessive absenteeism,⁵ and both testified that they understood that the next episode of excessive absenteeism could result in discharge.

E. The Alleged Unlawful Discharge of Johnson

During the period of time material to the complaint's allegations, Johnson's regular work schedule was 9:30 a.m. to 6:00 p.m. Monday and Friday, and 7:00 a.m. to 3:30 p.m. Tuesday, Wednesday, and Thursday. She was also required to work one weekend each month. Johnson has been diagnosed with rheumatoid arthritis and fibromyalgia, and at the time of her discharge she had been treated for these conditions for several years by Dr. Bulent Atac, a general practice physician, and by Dr. Joshua Weinstein, a rheumatologist.

⁴ Oliver testified that during previous disability leaves, Johnson had also contacted the laboratory department to keep them informed as to her absence and anticipated return date.

⁵ None of the absences resulting in discipline involved Johnson's previous disability leaves.

Johnson testified that on August 18, she was experiencing severe pain in her back, as well as tingling in her hands and feet. Because her shift began at 7:00 a.m. that day, she called overnight supervisor Cheryl Barrow, and told her that she would not be reporting for work. She then visited Dr. Atac, but her symptoms did not improve, and on August 19 she went to the emergency room at Weiler Hospital to seek treatment. She was treated for back pain and a migraine headache, and released the next day in the late morning.⁶ Johnson testified that while at Weiler Hospital on August 19 she called evening supervisor Bottini, and let him know that she was in the hospital and would not be reporting to work over the weekend. According to Johnson, Bottini responded that he would document this and find coverage for Johnson's shift. However, Bottini's note in the call-out log for the laboratory department states "Kawana Johnson called out sick for Fri 8/20."

Johnson testified that on August 21, she called the laboratory and spoke to weekend supervisor Patricia Bauer. Johnson testified that Bauer had previously called her to ask why she hadn't reported for work that day, and when she called Bauer back she told her that she had just been discharged from the hospital. Johnson testified that she told Bauer that Bottini was supposed to arrange coverage for the weekend. Johnson testified that on August 22, she called the overnight supervisor to inform them that she would be absent the next day due to illness. She testified that on August 23 she also called a laboratory department supervisor to call out sick for the next day; the laboratory call-out log indicates that Johnson spoke to co-worker Melissa Briggs. On August 25, she called the department twice, first speaking to Barrow to indicate that she would not be in that day, and later to state that she would not be in on August 26. The laboratory call-out log again indicates that Johnson spoke to Briggs. Johnson testified that she knew at this point that after seven days she would be subject to charges of absenteeism if she continued to call out sick on a daily basis, instead of going on a disability leave. Johnson testified that on August 26, she spoke to someone from Occupational Health Services, but could not recall who she spoke to or the substance of the conversation. Johnson also called the laboratory department on August 26, but could not recall whether she spoke to anyone, or the substance of that conversation either.

Johnson admitted during her testimony that she did not go to work, call out sick, or contact the hospital on August 27, 28, 29, and 30. Although Johnson's phone records produced by General Counsel show calls to Respondent's facility on August 31, September 2, and September 3, Johnson could not recall whether she spoke to anyone on those dates, and could not recall the substance of any conversations. She admitted that she never spoke to Iris Oliver, who was at that point her direct supervisor,⁷ regarding any of her absences. Johnson contended during her testimony that she never received any voicemail messages from Respondent's managers or supervisors regarding her absence.

Liller testified that about a week after August 18, Oliver and Aviles asked her whether Johnson had submitted paperwork for a disability leave. Liller testified that she told Oliver and Aviles that Johnson had not submitted any paperwork, and reported the issue to Sanchez. Oliver testified that on August 26, after discussing Johnson's continuing absence with Sanchez and Palazola, she and Aviles called Johnson's cell phone, using a speakerphone in Rivera's office. When Johnson did not answer, they identified themselves and left a message stating that Johnson should contact Occupational Health Services and Aviles (Oliver was about to

⁶ It is undisputed that records regarding this emergency room visit, and the September 15 emergency room visit discussed below, were never provided to Respondent.

⁷ Martha Rivera began a disability leave on August 20 which continued until after Johnson was discharged. Oliver was out on a disability leave from April 28 until August 2.

leave for vacation). Oliver testified that Johnson never returned this call. Oliver and Aviles jotted down a note regarding their voicemail message, and when Oliver returned from vacation on September 3, she asked Liller whether she had any information regarding Johnson's return to work. Liller told her that she had no additional information. Oliver testified that she had
 5 several discussions with Palazola to convey staff complaints regarding Johnson's continued absence.

Johnson testified that after August 26, she next contacted Respondent on September 8. Johnson testified that on that day she visited Dr. Atac, because her symptoms had not
 10 improved. After an examination, Dr. Atac completed his portion of the Notice and Proof of Claim for Disability Benefits. The Notice as completed by Dr. Atac was faxed to Occupational Health Services that day. However, Dr. Atac testified that he initially did not complete the area of the Notice requiring a return to work date, because he preferred to have Dr. Weinstein, Johnson's rheumatologist, provide that information. Later that morning, Occupational Health Services told
 15 Johnson that although they had received the Notice they could not process it because there was no return to work date. Johnson reported this to Dr. Atac's office, and eventually the Notice was faxed to Occupational Health Services with a return to work date of September 15.⁸ It appears that Dr. Atac actually placed the September 15 date on the form, but there is no evidence as to whether he consulted with Dr. Weinstein prior to his doing so. In any event, there is no dispute that Respondent's Occupational Health Services Department received this form, with the return
 20 date of September 15.⁹

Johnson testified that she visited Dr. Atac again on September 13, because her symptoms, including back pain and reactions to prescribed medications, were continuing. Dr.
 25 Atac completed a Disability Follow-Up Request form indicating that Johnson was suffering from a urinary tract infection with dizziness, fever, and chills, and stating that Johnson could return to work on October 4. Johnson testified that she brought this form to Dr. Atac's receptionist, who stamped and faxed it. Johnson testified that she then called Respondent's facility, using Dr. Atac's office phone, and that the receptionist, Heidi, in Occupational Health Services confirmed
 30 that they had received it.¹⁰

Liller testified that she spoke with Johnson once after September 8 regarding the status of her disability leave and return to work. According to Liller, Johnson stated that forms had been faxed from Dr. Atac's office to Occupational Health Services, and Liller told Johnson that
 35 she had not received them. Liller testified that Johnson had other conversations of this nature with receptionist Heidi Vallon, who, as far as Liller was aware, provided the same information. Liller testified that after September 8 she did not receive any Disability Follow-Up Request forms or other medical documentation regarding Johnson's leave.

40 ⁸ Johnson testified that she also called Aviles in the laboratory department that September 8 to wish her Happy Birthday, but they did not discuss her absence or leave.

⁹ Johnson testified that she did not make an application leave under the Family Medical Leave Act in connection with her absence from employment in 2010.

45 ¹⁰ Dr. Atac testified at the hearing, but had little independent recollection of Johnson's condition or treatment, and no specific recollection of her visits on September 8, 13, or 20. Dr. Atac testified that his typical procedure was to complete forms such as the Disability Follow-Up Request in the presence of the patient after examining them, and give them to the patient in the examining room. The patient was then responsible for providing the completed form to their
 50 employer. Dr. Atac testified that as a general practice his office did not fax forms on behalf of patients "all that much," due to the volume of forms processed by his office.

Respondent's supervisors and managers testified that they had numerous discussions regarding Johnson's continued absence after September 15. Palazola testified that the phlebotomy staff, principally Oliver and Aviles, made repeated complaints that they had not heard from Johnson, and did not know when she would return to work, if at all. On September 20, Sanchez, Palazola, Oliver, and Aviles met regarding the issue, and Sanchez decided to discharge Johnson. Oliver testified that she was the manager who initiated discussions to have some sort of action taken against Johnson, because she had no information regarding Johnson's return, the staff was complaining, and a schedule had to be formulated. During the September 20 meeting, Oliver and Aviles reported that they had attempted to reach Johnson by leaving voicemail messages for her on two occasions, but she had not returned their calls. Sanchez also contacted Liller regarding the status of Johnson's medical documentation, and Liller informed him that Occupational Health Services had received nothing after the initial September 8 Notice and Proof of Claim for Disability Benefits form with the September 15 return date. Sanchez testified that based upon the information provided by Liller, Palazola, Oliver, and Aviles, he decided to discharge Johnson for job abandonment. Palazola testified that he supported Sanchez's decision. Sanchez testified that he began preparing a termination letter to send to Johnson on September 20, but he did not complete the letter until September 22, and it was sent out on that date.

On September 15, Johnson had gone to the emergency room at Weiler Hospital, where she was treated for vomiting and released. On September 20, she returned to Dr. Atac's office, where she was examined for nausea, vomiting and diarrhea. Dr. Atac completed another Disability Follow-Up Request form with a return to work date of October 4. Johnson testified that after Dr. Atac completed the form she brought it to the receptionist, who stamped it and faxed it to Respondent. Johnson testified that on September 21 she spoke with the receptionist in Occupational Health Services to confirm that they had received the Disability Follow-Up Request from Dr. Atac.

Johnson testified that after calling Occupational Health Services on September 21 to confirm the receipt of the September 20 Disability Follow-Up Request, she called Iris Oliver to let Oliver know that Dr. Atac had cleared her to return to work on October 4. Johnson testified that she asked Oliver whether her schedule would remain the same when she returned to work. Oliver told Johnson that she was too busy to speak with her, and asked that Johnson call Aviles regarding her schedule. Johnson testified that she then called Aviles, and explained that Oliver had been too busy to speak to her about her schedule. Aviles told Johnson that she would have to speak to Sanchez before returning to work. Johnson testified that after speaking with Aviles, she called the hospital's main number (because she did not have Sanchez's direct extension), a "numerous amount" of times and left messages for him, but Sanchez did not return her calls. Sanchez testified that he received one or two messages after making the decision to discharge Johnson, and that he left one or two voicemail messages for her in return. Johnson denied receiving any such voicemail messages.

Sanchez testified that when he learned of Oliver and Aviles' conversations with Johnson on September 21, he checked again with Liller to determine whether she had received any documentation extending Johnson's disability leave past September 15. Liller stated that she had received nothing.

Johnson testified that on October 4 she arrived at Respondent's facility at 9:00 a.m., and went to the human resources department, telling the receptionist that she was there to speak to Sanchez. After consulting with Sanchez, the receptionist told Johnson that he was busy, but Johnson insisted on speaking with him because her shift was to begin at 9:30. According to Johnson, Sanchez asked what he could do for her, and she stated that she had been cleared to

return to work. Sanchez responded that Johnson had abandoned her position, and had been discharged. Johnson asked Sanchez how she could have been discharged when she was on disability, and Sanchez asked whether she had received a certified mail letter from the hospital. Johnson said she had not, and asked whether Sanchez had received the card with her signature. Sanchez looked through some mail, said he had not received the card, and suggested that Johnson check with her post office. Palazola then asked Johnson why she had not kept in contact with him, and Johnson responded that she did not know she was required to do so, as long as she continued faxing the appropriate paperwork to Occupational Health Services. Palazola said that as a matter of courtesy she should have called him, and Johnson countered that common courtesy required that Sanchez return the calls she had made to his office. Johnson testified that she then tried to show Sanchez and Palazola the September 13 and 20 Disability Follow-Up Request forms, but they “refused to look at the forms,” and told Johnson that her position had been filled. Sanchez asked Johnson for her employee identification and the like, and the meeting ended.

Sanchez and Palazola testified that when Johnson arrived unexpectedly on October 4, Sanchez reviewed the discharge letter with her, telling her that she was expected to return to work on September 15, and that they had received no additional documentation. Sanchez explained that the discharge letter had been returned as unclaimed. Palazola testified that he told Johnson he was surprised that she never reached out to him for assistance. He testified that Johnson said that she was supposed to be cleared by a second physician, and that additional medical documentation had been sent to Occupational Health Services. Sanchez said that Occupational Health Services had never received it. Sanchez provided Johnson with a copy of the termination letter. Palazola and Sanchez both testified that Johnson never attempted to provide additional medical evidence, and that Sanchez never refused to give Johnson a copy of her termination letter. Sanchez denied telling Johnson to go to the Post Office to retrieve the discharge letter.

Johnson testified that after the meeting with Sanchez and Palazola, she went to Dr. Atac’s office and spoke to the receptionist, who insisted that the September 13 and 20 Disability Follow-Up Request forms had been faxed to Respondent. Dr. Atac’s office then prepared a letter, dated October 6, stating that they had faxed the September 13 and 20 Disability Follow-Up Request forms to Respondent on those dates. During direct examination, Johnson testified that on October 6 she retrieved this letter from Dr. Atac’s office, after Dr. Atac’s assistant faxed it to Occupational Health Services.

The October 6 letter admitted into the record as General Counsel Exhibit 13 contains Dr. Atac’s stamp, and the stamp and signature of Notary Public LaShawn Dixon. Dr. Atac testified that there were no notaries in his office, and that the letter was not notarized by his office. On cross-examination, Johnson testified that she had the October 6 letter notarized at a storefront office, but refused to reveal her reasons for doing so.

Johnson testified that she subsequently visited and called the Post Office, whose personnel informed her that the tracking number for the certified termination letter from Sanchez did not exist. She also called the receptionist in human resources, who could not locate the letter or the tracking number either. She testified that she finally received the discharge letter on October 11.

The original termination letter, in its envelope with certified mail attachments, was returned to Respondent, and was admitted into evidence as Respondent Exhibit 9. I examined and opened the envelope with the certified mail attachments. Upon examination, the envelope had not been opened; the green return receipt on the back of the envelope was attached over

the envelope's flap, sealing the flap in place. The letter had been stamped "Return to Sender, Unclaimed, Unable to Forward" by the Postal Service. Johnson reviewed these Exhibits, and confirmed that her home address on the front of the envelope was correct. When opened, the envelope contained Sanchez's September 20 letter discharging Johnson.

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III. Analysis and Conclusions

A. Credibility Resolutions

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I did not find the Charging Party Kawana Johnson to be a credible witness. I consider the fact that Johnson took Dr. Atac's October 6 letter and had it notarized without his knowledge to have a significant detrimental impact on her overall credibility. This conduct indicates a willingness to alter documents critical to the central issue in this case – whether Respondent received the forms necessary for continued approval of Johnson's disability leave – in order to misleadingly infuse them with the legal weight of a sworn statement. In addition, when Johnson was questioned at the hearing regarding her having had Dr. Atac's letter notarized out of his presence and without his knowledge, she became belligerent, and refused to admit that she had any reason for having the letter notarized, stubbornly insisting that "I just did it" (Tr. 217-219). Such testimony is obviously unworthy of belief, and erodes confidence in Johnson's reliability as a witness overall.

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Other documentary evidence also undermines Johnson's credibility, and belies the veracity of her contention that she personally observed Dr. Atac's staff fax the September 13 and 20 Disability Follow-Up Request forms to Respondent. On October 22, Johnson filed a Verified Complaint with the New York State Division of Human Rights alleging that Respondent discharged her in retaliation for her disability (rheumatoid arthritis). In her sworn statement in support of the Complaint, Johnson claims that she, as opposed to the staff of Dr. Atac's office, sent or faxed the September 13 and 20 forms to Respondent. In addition, in her sworn statement Johnson initially stated that she "sent over" the forms, then crossed out the words "sent over" and wrote in "faxed over." Given the other indications that her contentions are less than credible, I find these discrepancies significant. During her testimony at the hearing Johnson initially denied filing a complaint alleging that her discharge constituted some sort of discrimination on the basis of disability, when she plainly did so. This testimony also militates against finding Johnson a credible witness.

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I also find that Johnson's phone records, and her testimony regarding them, have little probative value and reflect poorly on her overall credibility. Johnson repeatedly claimed that her phone bills for the periods August 21 through September 20 and September 21 through October 20, admitted into evidence as General Counsel Exhibits 10 and 12, were complete (Tr. 107-110, 126), and contended that Respondent had never left voicemail messages for her regarding her absence. However, the bill for the period August 21 through September 20, in evidence as General Counsel Exhibit 10, contains pagination in the lower left hand corner indicating that it is comprised of 48 pages, of which only page 1, and pages 6 through 19, are contained in the Exhibit. Johnson eventually admitted that there were other segments of these phone records, such as records pertaining to text messages, which were not included in the Exhibits (Tr. 109). Johnson also testified that her August 21 call to Patricia Bauer was a response to a message left for her by Bauer, which is not reflected on her phone records. As a result, her contention that the phone records were complete is not credible, and I find that the phone records are not probative of Johnson's receipt (or non-receipt) of voicemail messages.

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In addition, Johnson's affidavits contained statements involving crucial issues which were contradicted by the evidence adduced at the hearing, including her own testimony. For

example, Johnson claimed in her first affidavit that she called in sick every morning during the weeks after August 18, and “spoke to the same supervisor Cheryl,” and a similar statement appears in her second affidavit. However, Johnson’s testimony and her phone records establish that she did not call in sick every day, and did not speak to Cheryl every time she did call in. In fact, Johnson eventually admitted that she did not contact the hospital at all for at least four days at the end of August, and could not recall discussions with any supervisor to call out sick during the week prior to September 8. In addition, in her second affidavit Johnson contended that she was on sick leave from August 18 to September 8. However, as Johnson testified, she was required after seven days of continuously calling in sick to complete the paperwork necessary for a disability leave, and she stopped calling in sick during the last week of August. Although an employee’s characterization of the specific form of leave taken might in other circumstances be immaterial, given Johnson’s extensive experience with Respondent’s sick leave and disability policies, and the importance of these issues to the allegations here, I find this inconsistency significant.

Finally, Johnson was evasive in responding to several lines of pertinent questioning on cross-examination, not only when refusing to provide her reasons for having Dr. Atac’s October 6 letter notarized, but also when asserting that she never spoke directly with Liller during her absence (Tr. 204-205), and prior to admitting that she was required to contact her own supervisor when calling out sick prior to beginning a disability leave (Tr. 134-135). Although some of the questioning on these matters was aggressive, Johnson’s circuitous responses and failure to provide information in a straightforward manner were not indicative of credible testimony.¹¹

For all of the foregoing reasons, I find that Johnson was not a believable witness. As a result, I have not credited her testimony where it was contradicted by other witnesses, and have generally credited her testimony only where it is consistent with documentary evidence or with the testimony of other witnesses.

B. Respondent did not Unlawfully Interrogate Employees or Create the Impression of Surveillance of Employees’ Union Activities in Violation of Section 8(a)(1) of the Act

I find that the evidence does not establish that Martha Rivera unlawfully interrogated employees or created the impression of surveillance, as alleged in the complaint. Johnson repeatedly testified that the conversation with Rivera during which these violations allegedly occurred took place during the first two weeks of July, prior to the July 14 election (Tr. 233, 237). I credit the testimony of Rivera and Liller that Rivera was on a disability leave from June 30 to July 19, and therefore was not present at Respondent’s facility during that time. As a result, crediting Johnson’s testimony regarding the approximate date of the conversation, it could not have taken place.

Given Johnson’s lack of credibility overall and the fact of Rivera’s disability leave during the first two weeks of July, I credit Rivera’s testimony that she never questioned employees about the Union, made statements indicating that she was trying to determine whether they supported the Union, or showed employees a list of terminated bargaining unit employees.

¹¹ Respondent argues that the medical evidence regarding Johnson’s condition during August and September is “flimsy,” and casts a negative light on her credibility overall. I find it unnecessary to consider evidence regarding Johnson’s medical condition in and of itself, given the evidence affecting her credibility which is directly relevant to the material issues in the case.

Finally, I note that, even if Johnson’s account of her discussion with Rivera were credible, a number of factors typically considered in order to determine whether a supervisor’s statement constitutes a coercive interrogation or a statement creating the impression of surveillance militate against a finding those violations here. The Board determines whether questioning regarding union activities is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer’s hierarchy, the place and method of questioning, and the truthfulness of the employee’s answer. *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p. 17 (2010); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board also considers whether the employee was an open and active union supporter at the time of the allegedly coercive interrogation. *Evergreen America Corp.*, 348 NLRB 178, 208 (2006). The evidence as discussed above establishes that Johnson was an open union supporter at the time her conversation with Rivera allegedly occurred. As of early July, she had repeatedly met with Peterson outside the facility, and had appeared in the Union’s leaflet urging employees to vote for union representation. Rivera was also a lower-level or front-line supervisor, as opposed to a high-level managerial official. See, e.g., *Cardinal Home Products*, 338 NLRB 1004, 1005-1006 (2003). As discussed further below, there is little or no evidence of anti-union animus on Respondent’s part. In addition, Johnson testified that she and Rivera had a close personal relationship, to the extent that Johnson referred to Rivera as her “lab mom.” The existence of a personal relationship may contradict a finding that the questioning at issue is coercive. See, e.g., *Smithfield Packing*, 344 NLRB 1, 2 (2004). Therefore, even if, as Johnson claims, Rivera told her that Johnson was “badmouthing her to the union,” the comment is susceptible to a personal, as opposed to coercive, interpretation given the context of Rivera and Johnson’s relationship.¹² Finally, the Board has previously held that statements such as Rivera’s alleged assertion that she had heard Johnson was badmouthing her to the Union do not impermissibly create the impression of surveillance. *Asociacion Hospital del Maestro*, 291 NLRB 198, 204-205 (1988).

For all of the foregoing reasons, the evidence does not establish that Respondent unlawfully interrogated employees or created the impression of surveillance in violation of Section 8(a)(1) of the Act.

C. Respondent did not Discharge Johnson in Retaliation for her Union Activities in Violation of Sections 8(a)(1) and (3) of the Act

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an employee’s discharge violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s union sympathies or activities were a substantial or motivating factor in the employer’s decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee’s union support or activity, employer knowledge of that activity, and animus against the employee’s protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer’s motive can be based upon

¹² Johnson did not testify regarding her response to Rivera’s comments during the private meeting that she contends took place.

direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

5 If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's union support or activities. *Wright Line*, 251 at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by
10 stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

15 I find in this case that the evidence does not establish that any anti-union animus was a factor in Respondent's determination to discharge Johnson. I find that Respondent has substantiated its contention that it would have discharged Johnson even in the absence of her union activities, and in fact discharged Johnson because of her continuing absence and failure to comply with Respondent's disability leave policies.

20 The evidence establishes here that Johnson engaged in union activities which were fully known to Respondent. I credit the testimony of Peterson and Johnson that Sanchez and Sosa observed them meeting outside the facility. There is no dispute that Johnson's photograph appeared in a leaflet in support of the Union, and that Johnson was the Union's observer during
25 the election on July 14. Oliver and Rivera both testified that they believed that Johnson supported the Union and was engaging in activities on its behalf. As a result, Johnson's union activities and Respondent's knowledge are not at issue here.

30 Other elements of General Counsel's *prima facie* case, however, are significantly more tenuous. The record contains scant evidence of anti-union animus. It is undisputed that Respondent has had a collective bargaining relationship with the Union covering another bargaining unit of employees for a number of years, and there is no evidence to indicate that their dealings have been acrimonious. See *Oak Tree Mazda*, 334 NLRB 110, 115 (2001). Because the evidence does not substantiate the complaint's allegations that Rivera unlawfully
35 interrogated Johnson and created of the impression of surveillance, there are no violations of Section 8(a)(1) of the Act which could serve as an evidentiary basis for a finding of anti-union animus. See, e.g., *Austal USA, LLC*, 356 NLRB No. 65 at p. 1-2 (2010).

40 Although Respondent apparently conducted a campaign opposing the Union's efforts to represent another bargaining unit of employees, there is little probative evidence as to its nature or Respondent's specific activities. Peterson's testimony that Respondent was engaged in a "heavy anti-union campaign" with an "anti-union consultant" was based solely on his "understanding," and as such is non-probative hearsay.¹³ Johnson testified to a number of
45 comments made by Schandler at a meeting with employees, including the statement that he did not want a third party involved between him and his employees. Given my overall lack of confidence in Johnson's credibility, I decline to make a finding of animus based on this

50 ¹³ There was also no foundation established for Peterson's testimony that Respondent had "extra hired security outside also watching us."

comment, as General Counsel urges.¹⁴ Finally, although Peterson testified that Sanchez told him during the organizing campaign not to speak with the non-union employees at the facility, this one comment, in and of itself, is insufficient to establish anti-union animus. Overall, the sparse evidence in the record, which primarily establishes lawful campaigning on Respondent's

5 part, is insufficient to make a finding of anti-union animus. *See, e.g. Sears, Roebuck and Co.*, 337 NLRB 443, 450-451 (2002) (declining to find anti-union animus based on employer's lawful pre-election campaigning).

The timing of Johnson's discharge is also inconsistent with a conclusion that

10 Respondent discharged her in retaliation for her union activities. Although the election took place on July 14 and the majority of Johnson's union activities took place prior to that time, she was not discharged until September 20, over two months later. *See Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (two month period between protected activity and allegedly retaliatory warning

15 militates against a finding of unlawful motivation). More importantly, she was not discharged until after unrelated events which Respondent contends constitute its actual reason for her termination – her abandonment of her job by failing to submit the required documentation for continuing a disability leave which began in August. Given the intervening events of Johnson's alleged failure to submit the required documentation for her disability leave in August and September, the timing of her discharge does not support an inference that her discharge was

20 unlawfully motivated. *Pacesetter Corp.*, 307 NLRB 514, 521-522 (1992).

For all of the foregoing reasons, it does not appear to me on this evidence that General Counsel has established a *prima facie* case that Johnson was discharged in retaliation for her union activities. Nevertheless, I find that to the extent General Counsel has established a *prima*

25 *facie* case, Respondent has shown by a preponderance of the credible evidence that it would have discharged Johnson for job abandonment regardless of her union activities.

The evidence substantiates Respondent's contention that it discharged Johnson on September 20 because she abandoned her job by failing to provide the required Disability

30 Follow-Up Request forms to Occupational Health Services. The evidence clearly demonstrates that Respondent's policies require the submission of a Notice and Proof of Claim for Disability Benefits after seven days of continuous absence, and require the submission of a Disability Follow-Up Request form every two weeks thereafter. Respondent's policies provide that the submission of appropriate paperwork is the employee's responsibility, and I credit Liller's

35 testimony that she communicates this principle to employees when discussing Respondent's Occupational Health policies with them. The evidence establishes that Johnson was fully cognizant of these requirements, having been on disability leaves every year starting in 2006. There is no dispute that during the previous disability leaves Johnson complied fully with all disability leave policies. There is also no evidence that any of the requirements for disability

40 leave were waived during the previous leaves, or that Johnson was treated any differently with respect to her 2010 disability leave than she had been treated during her disability leaves in the past.

I credit the testimony of Liller that Occupational Health Services never received the

45 forms completed by Dr. Atac on September 13 and 20, containing a return to work date of

¹⁴ Johnson also contended that Schandler told the employees during this meeting that if the Union won the election they would not have job security and the night shift differential would decrease. Such a statement would be unlawful, but is not alleged as a violation, and General

50 Counsel does not argue that it should be considered in making a finding of anti-union animus.

October 4.¹⁵ I do not credit Johnson's testimony that she observed these forms being faxed to Respondent from Dr. Atac's office, and that Vallon confirmed their receipt by phone. As discussed above, Johnson's reliability on this issue was substantially undermined by her having notarized Dr. Atac's October 6 letter, her statements in her Verified Complaint to the New York State Division of Human Rights, the incomplete phone records she provided, and her evasive, circuitous testimony regarding these issues. In addition, Dr. Atac testified that his office's typical practice was not to fax such forms on behalf of patients, given the volume of work for his staff which would ensue. For all of these reasons, and for the other reasons discussed above regarding Johnson's credibility, I credit Liller's testimony that Respondent's Occupational Health Services Department never received the September 13 and 20 Disability Follow-Up Request forms. I find as a result that the evidence does not establish that Respondent received the forms, and that, as Respondent contends, Johnson was expected back to work on September 15, as there was no documentation which would excuse a continued absence after that time.

I also credit Liller's testimony that she spoke with Johnson once, and informed her that Respondent had not received the required Disability Follow-Up Request forms for extending her leave. I note that Johnson was particularly evasive when questioned on cross-examination with respect to this issue. I credit Liller and Oliver's testimony that they called Johnson and left voicemail messages for her prior to her discharge. Because the phone records Johnson provided were obviously incomplete, I do not consider them probative on the issue of whether or not these voicemail messages were left for her. As previously noted, Johnson's testimony that she never received voicemail messages from Respondent regarding her absence is also undermined by her admission that she received a message from Bauer.

I note that General Counsel introduced no evidence of disparate treatment or condonation which would tend to establish that Respondent's asserted reason for discharging Johnson was pretextual. Thus, there is no evidence which would tend to establish that Johnson was treated differently than other employees with respect to Respondent's disability leave policies. Respondent's evidence shows that it has terminated other employees who have failed to provide adequate disability leave documentation in the past. There is also no evidence that Respondent waived the documentation requirements during Johnson's past disability leaves, or that Johnson was treated any differently during her 2010 disability leave than she had been treated in the past.

I also note that the evidence here establishes that Johnson had previously been disciplined for excessive absenteeism. Respondent's Policy No. 407 provides for progressive discipline with respect to unexcused absences, beginning with a verbal warning and ending with discharge. Johnson admitted that she had been disciplined pursuant to this Policy, and that the last discipline imposed had been a three-day suspension, meaning that, according to the Policy's terms, the next such infraction would result in discharge. General Counsel adduced no evidence to show that any of these disciplinary policies were applied in a manner contrary to the contentions of Respondent's witnesses, or were selectively or disparately applied. In fact, evidence introduced by Respondent demonstrates that these policies have been the basis for discharge in the recent past. As a result, Respondent was within its prerogatives in discharging Johnson when, as of September 15, she was no longer on a disability leave. *Fresno Bee*, 337 NLRB 1161, 1161-1162 (2002).

¹⁵ I found Liller to be a straightforward and knowledgeable witness, who answered the questions posed to her in a forthright manner and to the best of her recollection.

Given all of the foregoing, I find that the evidence substantiates Respondent's contention that Johnson was legitimately discharged for job abandonment, and that Johnson was not terminated in retaliation for her union activities.

As a matter of fact, the evidence establishes that Respondent could have discharged Johnson prior to September 15. The evidence establishes that Johnson contacted her department to call out sick on most days from August 18 through August 26. However, after August 26, Johnson admittedly did not contact Respondent again until August 31, and Johnson had no memory of whether she actually spoke to anyone on that date (or on September 2 and 3), or what was said during any conversation.¹⁶ Therefore, the evidence establishes that after August 26, Respondent had no definitive information as to Johnson's status or return to work until it received the Notice and Proof of Claim for Disability Benefits completed by Dr. Atac on September 8. I credit Liller's testimony that as on or about August 26, Oliver contacted her to inquire as to the status of any disability leave, and that Liller stated that she had no documentation to that effect. As a result, after August 26, Johnson had again violated Respondent's unexcused absence policy, and was technically subject to termination on that basis at that time.¹⁷ That Respondent did not discharge her at that point, and instead accepted Dr. Atac's September 8 form initiating a disability leave, indicates that it gave Johnson leeway in applying its policies which is inconsistent with an unlawfully motivated desire to discharge her.

Finally, the evidence does not substantiate General Counsel's contention that Respondent failed to investigate Johnson's contentions regarding her disability leave in a manner which establishes that its asserted reason for her discharge was pretextual. Specifically, General Counsel contends that Respondent failed to perform an adequate investigation in that it did not contact Johnson or Dr. Atac's office prior to discharging her. As discussed above, the evidence establishes that Respondent's policy regarding disability leaves placed the onus on its employees for obtaining and submitting the required documentation. In addition, I have credited the testimony of Liller and Oliver that they attempted to contact Johnson in order to ascertain the status of her leave and medical condition – and that Liller actually informed Johnson that she had not received the Disability Follow-Up Request forms. As previously stated, there is no evidence indicating that Johnson was treated differently than other employees in Respondent's application of its disciplinary policies, or was treated

¹⁶ Respondent's policies require that an employee call out sick to their own supervisor, as opposed to any supervisor in their department. Respondent argues that Johnson violated the policies in this manner as well, and Johnson did admit that she never specifically called Oliver during the leave which began in August 2010 (Rivera was out herself at that point on a disability leave). Because there is no evidence to show that this policy was not applied in the manner asserted by Respondent, it appears that Johnson violated the call-out policies in this way as well.

¹⁷ I reject General Counsel's contention that Johnson stopped calling in sick in late August because she had been approved for vacation during that time. Johnson did not even mention any planned or approved vacation during her initial direct and cross-examination, despite extensive testimony regarding her leave and various contacts with Respondent in August. It was only during her redirect examination that she claimed for the first time that she had previously submitted paperwork for a two-week vacation in late August. She then explained that this belated testimony was intended to show that Respondent would have already arranged coverage for her absence during the period in late August when she was absent due to illness. I find this claim irrelevant, as Johnson did not dispute that she was actually out sick, as opposed to on vacation, during this period, and as such was subject to Respondent's policies regarding calling out sick to her supervisor on a daily basis.

5 differently during her 2010 disability leave than she had been treated in the past. As a result, I decline to find that Respondent was required to contact Dr. Atac's office directly in order to avoid a finding of pretext. The evidence therefore does not establish that Respondent failed to adequately investigate the situation prior to discharging Johnson in a manner suggestive of pretext.

10 For all of the foregoing reasons, I find that Respondent has demonstrated by a preponderance of the evidence that it discharged Johnson for job abandonment, and that would have discharged Johnson for this reason regardless of her union activities. As a result, Johnson's discharge did not violate Sections 8(a)(1) and (3) of the Act.

Conclusions of Law

15 1. The Respondent, White Plains Hospital, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, 1199 SEIU United Health Care Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

20 3. Respondent has not violated Sections 8(a)(1) and (3) of the Act by discharging Kawana Johnson in retaliation for her activities on behalf of the Union.

25 4. Respondent has not violated Section 8(a)(1) of the Act by unlawfully interrogating employees or creating the impression that its employees' activities on behalf of the Union were under surveillance.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The complaint is dismissed.

Dated, Washington, D.C., September 28, 2011.

Lauren Esposito
Administrative Law Judge

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50 ¹⁸ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.